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No. 05–409

In the Supreme Court of the United States

CARL KIRCHER, ET AL.

Petitioner,

v.

PUTNAM TRUST FUNDS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the court of appeals had jurisdiction to review the district court's holding that petitioners' state-law claims are not precluded by the Securities Litigation Uniform Standards Act of 1998.

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing a membership of more than three million businesses and organizations of every size, in every industry sector and geographical region of the country.[1] A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus* briefs in numerous cases addressing issues of vital concern to the Nation's business community. The Chamber filed a brief in *Merrill, Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. ___ (2005), which, like this case, involved the meaning of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105–353, 112 Stat. 3227 (codified as amended in various sections of 15 U.S.C.).

The Chamber has a substantial interest in the issue presented in this case: the appealability of a federal district court's determination that a securities class action arising under state law is not preempted by SLUSA. Securities class action litigation imposes an enormous toll on the national economy, affecting virtually every public corporation in America and costing American businesses billions of dollars in settlements every year. Indeed, a recent study concluded that, over a five-year period, the average public corporation has a 10% probability of facing at least one securities class-action lawsuit. Buckberg *et al.*, NERA, *Recent Trends in*

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the Clerk of the Court.

Securities Class Action Litigation: Are WorldCom and Enron the New Standard? 2 (July 2005).

Congress has enacted legislation to rein in some of the worst abuses of securities class-action litigation, assuring that class actions involving nationally traded securities are governed by federal standards and may be heard in federal court. Petitioners' argument in this case — which contends that appellate review is unavailable when a federal district court remands a removed securities class action to state court — departs from the language of the SLUSA and would frustrate the realization of Congress's goal to reform securities litigation. The Chamber believes that the experience of its members with abusive class action litigation makes it well situated to address the issues presented here.

SUMMARY OF ARGUMENT

1. Petitioners' argument rests on a misreading of SLUSA's removal provision. Petitioners contend that, where removal to federal court of a state-law claim asserted to be preempted by SLUSA is concerned, the merits and jurisdictional inquiries are identical. On this reading of the removal provision, a district court has jurisdiction to entertain the removed action only if it first resolves the merits of the suit by determining that plaintiffs' claims are in fact preempted, at which point the case must promptly be dismissed — an approach to removal that the Court, in a related setting, has labeled "anomalous." *Willingham* v. *Morgan*, 395 U.S. 402, 407 (1969).

That approach is not a plausible construction of the SLUSA removal provision. Instead, SLUSA is most naturally read as providing that removal is proper when the defendant asserts a *colorable* argument that the requirements for preemption are satisfied. That understanding follows from the statutory language, which separately treats removability and preemption. Indeed, the Court seemed to read the

removal provision just that way in *Dabit*, where it noted that the statute "makes all 'covered class actions' filed in state court removable." Slip op. 10 n.7. Under this reading of SLUSA, removal here plainly was proper; appellate review of the district court's rejection of respondents' preemption defense therefore follows as a matter of course.

2. The statutory background and policy confirm that district court decisions rejecting a SLUSA preemption defense are not insulated from appellate review. SLUSA is a part of Congress's comprehensive effort, begun with enactment of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104–67, 109 Stat. 737 (codified as amended at 15 U.S.C. § 77a *et seq.*), to curb abusive securities litigation. The PSLRA broadly reformed the process of federal securities litigation, establishing various safeguards against meritless strike suits. When plaintiffs sought to circumvent the PSLRA by bringing securities-fraud class actions under state law in state court, Congress responded by enacting SLUSA, which assures that securities class action litigation is governed by uniform national standards. SLUSA's removal provision, which makes it possible for federal courts to determine whether state-law securities class actions are precluded by SLUSA's substantive provisions, is a "key" element of the statute. *Dabit*, slip op. 10 n.7.

Against this background, petitioners' approach — which precludes appellate review of a district court's decision rejecting a SLUSA preemption defense in any case that has been removed from state to federal court — would substantially undermine the congressional goals. Under petitioners' reading, it is likely that defendants will never be able to test on appeal in *any* court their contention that particular state-law securities claims are preempted by federal law. This would make it impossible to achieve uniformity in the law. That, in turn, would encourage forum shopping by plaintiffs, inevitably would lead to the survival of abusive lawsuits, and

therefore would foment the very harms that Congress sought to prevent when it enacted the PSLRA and SLUSA.

3. Even if petitioners' reading of SLUSA is correct, their understanding of 28 U.S.C. § 1447(d) is not. That provision must be construed together with Section 1447(c) and in light of its purposes. Those purposes are undisputed: by barring appeal of a district court's decision to remand a case to state court, Section 1447(d) seeks to prevent interruption of litigation regarding the merits of a lawsuit by protracted disputes about peripheral jurisdictional or procedural matters. That policy, however, has no application in this case. Here, the jurisdictional issue (on petitioners' view of the case) is *not* distinct from the merits; to the contrary, petitioners submit that determination of jurisdiction requires *resolution* of the merits of the principal defense to liability. In such circumstances, the rationale for precluding appeal of remand orders — avoiding delay in adjudication of the merits — is wholly inapplicable.

ARGUMENT

I. SLUSA AUTHORIZES APPEALS FROM DISTRICT COURT ORDERS REJECTING SLUSA PREEMPTION

There is no doubt about the goal of SLUSA: Congress sought to implement uniform national standards governing securities class action litigation, while preventing the use of state-law securities claims to circumvent the federal-law reforms enacted by the PSLRA. See *Dabit*, slip op. at 9–10. It is manifest, however, that petitioners' contention in this case — which would preclude appellate review of district court decisions rejecting the preemption defense created by SLUSA — would frustrate those goals. In this case, as in *Dabit*, a "broad construction" of the relevant provision of SLUSA "follows not only from ordinary principles of statutory construction but also from the particular concerns that

culminated in SLUSA's enactment. A narrow reading of the statute would undercut the effectiveness of the 1995 Reform Act and thus run contrary to SLUSA's stated purpose, viz., 'to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives' of the 1995 Act." Slip op. 13–14 (quoting SLUSA § 2(5), 112 Stat. 3227). Petitioners' approach accordingly should be rejected and the decision below affirmed.

A. The Language Of SLUSA Distinguishes Between Removability And Preemption

At the outset, petitioners' argument rests on a misreading of SLUSA's removal provision. Petitioners' central argument is that, where SLUSA preemption is concerned, the merits and jurisdictional inquiries in a removed case are *identical*; on this reading of the removal provision, the district court has jurisdiction to entertain the removed action only if it first resolves the merits of the suit by determining that the plaintiffs' claim is in fact preempted by federal law. Petitioners thus understand SLUSA to dictate, as the Court put it when addressing a very similar argument regarding another removal provision, "the anomalous result of allowing removal only when the [defendants] had a sustainable defense." *Willingham* v. *Morgan*, 395 U.S. 402, 407 (1969). But this peculiar and counter-intuitive approach does not follow from the statutory text.

SLUSA's removal provision states that

> *[a]ny* covered class action brought in any State court *involving* a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

15 U.S.C. §§ 77p(c), 78bb(f)(2) (emphasis added). Respondents persuasively show that this language does not require

satisfaction of all of the requirements for preemption before removal is appropriate, and we will not repeat that argument in detail. It bears emphasis, though, that the statute is most naturally read as providing that removal is proper whenever the defendant asserts a *colorable* argument that the requirements for preemption are satisfied. That understanding follows from the removal provision's broad directive that federal courts may entertain "any" class action "involving" a covered security, as well as its separate treatment of removability (a class action "shall be removable") and preemption (removed case "shall be subject to subsection (b)"). Indeed, the Court recently seemed to read the provision in just that way in *Dabit*. There, the Court described SLUSA's removal language as a "key provision of the statute [that] makes all 'covered class actions' filed in state court removable to federal court" (slip op. 10 n.7); the Court did not suggest that a class action is removable only if the district court first determines that preemption is required by 15 U.S.C. § 77p(b), the SLUSA preclusion provision.

This reading of SLUSA also accords with the Court's approach to analogous removal provisions. The statute permitting federal officer removal, for example, authorizes removal to federal court of a suit against a federal officer if the action is for "any act under color of such office." 28 U.S.C. § 1442(a)(1). The Court has not read that statute to provide for removal only if the district court first determines definitively that the defendant *in fact* was acting under color of federal office, as petitioners' approach here would seem to dictate. Instead, the Court has held the language to be

> [b]road enough to cover all cases where federal officers can raise a *colorable* defense arising out of their duty to enforce federal law. One of the primary purposes of the removal statute — as its history clearly demonstrates — was to have such defenses litigated in the federal courts. [Petitioners']

> position * * * would have the anomalous result of allowing removal only when the officers had a clearly sustainable defense. The suit would be removed only to be dismissed. Congress clearly meant more than this * * * . The officer need not win his case before he can have it removed. In cases like this one, Congress has decided that federal officers * * * require the protection of a federal forum. This policy should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1).

Willingham, 395 U.S. at 407 (emphasis added). See also *Jefferson County* v. *Acker*, 527 U.S. 423, 431–432 (1999).

The same considerations apply here. The language of Section 1447(d) likewise is "[b]road enough to cover all cases where [class action defendants] can raise a colorable defense" of SLUSA preemption. By the same token, enactment of the SLUSA removal provision itself shows that, "[i]n cases like this one, Congress has decided that [class action defendants] * * * require the protection of a federal forum." Because the preemption defense here surely is more than colorable — as the holding in *Dabit* establishes beyond dispute — removal accordingly was proper. That being so, the district court's rejection of the preemption defense cannot be thought to have retroactively divested that court of jurisdiction to entertain the suit. Appellate review of the district court's preemption decision therefore is warranted as a matter of course.[2]

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[2] For reasons explained by respondents (at Br. 12–16), an otherwise appealable decision cannot be insulated from review simply because the district court purports to base its remand on lack of jurisdiction. In *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976), for example, mandamus surely would not have become unavailable had the district court asserted that it lacked jurisdiction to decide the case because its docket was crowded.

B. The Unambiguous Policy Of SLUSA Confirms That Securities Class Actions Belong In Federal Court

Petitioners' reading of SLUSA accordingly misunderstands the statutory language. But to the extent that there is any doubt on that score, the statutory background and policy confirm that SLUSA should not be read to insulate district court decisions that reject a preemption defense from appellate review. The SLUSA was designed to establish uniform national standards governing securities litigation, while discouraging abusive securities class actions. Petitioners' reading of the SLUSA removal provision would undermine both of those goals, and thus would frustrate the paramount "federal interest in protecting the integrity and efficiency of the market for nationally traded securities." *Dabit*, slip op. 5. As a consequence, respondents' reading of SLUSA is the one that "more accurately reflects the intention of Congress, is more consistent with the structure of the Act, and more fully serves the purposes of the statute." *FBI* v. *Abramson*, 456 U.S. 615, 624–625 (1982).

1. SLUSA Was Intended To Establish Uniform Federal Standards To Govern Securities Class Action Litigation, Thus Discouraging Abusive Lawsuits

a. To appreciate the extent to which petitioners would depart from the congressional intent, it is useful to begin with a consideration of the underlying problem that Congress sought to address when it enacted SLUSA: Congress was concerned that securities class action litigation fostered abusive lawsuits, with destructive consequences for the national economy. As this Court has recognized, securities-fraud litigation presents "a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general" (*Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975)) because such suits contain unique elements

that encourage defendants to settle even insubstantial claims — and that, as a consequence, encourage plaintiffs to file them. See generally Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986).

The direct costs of securities litigation impose enormous burdens on defendants,[3] while the sheer size of the damages demanded in national class actions makes it attractive for defendants to forgo the adversarial process and settle even meritless suits to avoid the prospect of ruinous liability. See H.R. Conf. Rep. No. 104–369, at 37–38 (1995); S. Rep. No. 104–98, at 5, 9 (1995). That is so regardless of the strength of the plaintiffs' claims; the costs and risks of litigation make the merits of securities suits largely irrelevant to the decision to settle. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 516–517 (1991).[4]

These insubstantial strike suits are of little benefit to shareholders. In addition to the significant transaction costs

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[3] See, *e.g.*, Kassis, *The Private Securities Litigation Reform Act of 1995: A Review of Its Key Provisions and an Assessment of Its Effects at the Close of 2001*, 26 SETON HALL LEGIS. J. 119, 124 (2001) (describing the discovery process as "financial blood letting"); see also Pritchard, *Markets as Monitors: A Proposal to Replace Class Actions with Exchanges as Securities Fraud Enforcers*, 85 VA. L. REV. 925, 953 (1999) (lost productivity may "dwarf the expense of attorneys' fees"); S. Rep. No. 104–98, at 14 (1995).

[4] See also Garry *et al.*, *The Irrationality of Shareholder Class Action Lawsuits: A Proposal for Reform*, 49 S.D. L. REV. 275, 287 n.98 (2005); Bohn & Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. PA. L. REV. 903, 979–980 (1996).

such suits entail, to the extent that class members still own shares in the issuer, "payments by the corporation to settle a class action amount to transferring money from one pocket to the other, with about half of it dropping on the floor for lawyers to pick up." Alexander, *Rethinking Damages in Securities Class Actions*, 48 STAN. L. REV. 1487, 1503 (1996); see also Coffee, *Causation by Presumption? Why the Supreme Court Should Reject Phantom Losses and Reverse* Broudo, 60 BUS. LAW. 533, 542–543 (2005); Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 921–922; Easterbrook & Fischel, *Optimal Damages in Securities Cases*, 52 U. CHI. L. REV. 611, 638–639 (1985). At the same time, the costs of abusive litigation are felt throughout the national economy. These costs are borne disproportionately by the most innovative and entrepreneurial companies, which are targeted because the volatility of their share price attracts the attention of the plaintiffs' bar[5]; the risk of liability deters competent individuals from serving as independent directors on corporate boards (see S. Rep. No. 104–98, at 21); accounting firms, often named as deep-pocket defendants, become less willing to perform auditing services (see *id.* at 21–22); and D&O insurers must increase premiums or stop underwriting policies altogether. See *id.* at 21.

Furthermore, because any statement by an issuer that later is proven inaccurate or any prediction that fails to come true could form the predicate for an allegation of fraud, the prospect of liability chills corporate disclosures of informa-

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[5] See *Securities Litigation Reform Proposals: Hearings on S. 240, S. 667, and H.R. 1058 Before the Subcomm. on Securities of the S. Comm. on Banking, Housing, and Urban Affairs*, 104th Cong., 1st Sess. 109 (1995) (testimony of George Sollman on behalf of the American Electronics Association) (estimating that about half of the top 100 companies in Silicon Valley have been subjected to a securities class action lawsuit at least once).

tion that could be useful to investors, thus directly frustrating the disclosure objectives of the federal securities laws. See *id.* at 15–16; Easterbrook & Fischel, THE ECONOMIC STRUCTURE OF CORPORATE LAW 339 (1991) (noting that because a firm that discloses information "inevitably takes the risk of excessive optimism and excessive pessimism," a "rule penalizing excesses in either direction would lead to silence" about a company's prospects). The risk of liability also muzzles corporate managers' communications with analysts, which are "necessary to the preservation of a healthy market." *Dirks* v. *SEC*, 463 U.S. 646, 658–659 (1983); see also SEC, Release No. 33–7881, 65 Fed. Reg. 51716, 51718 n.19 (2000) ("fear of legal liability" "chill[s]" communications with analysts). And when SEC disclosure requirements do not make silence an option, issuers may respond to the threat of unconstrained liability with defensive disclosures that "bury the shareholders in an avalanche of trivial information." *TSC Indus.* v. *Northway, Inc.*, 426 U.S. 438, 448–449 (1976).[6]

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[6] In addition to detracting from the quantity and quality of information received by investors, securities class-action abuse reduces the overall competitiveness of United States securities markets, as fear of potential liability deters foreign companies from listing on domestic stock exchanges. *Common Sense Legal Reform Act: Hearings on H.R. 10 Before the Subcomm. on Telecommunications and Finance of the H. Comm. on Commerce*, 104th Cong., 1st Sess. 221, 224 (1995) (statement of former SEC Chairman Richard C. Breeden) ("Based on conversations with potential issuers of securities all over the world, the fear of litigation inhibits foreign firms from participating in the U.S. market[s]."); see also PricewaterhouseCoopers LLP, *2004 Securities Litigation Study* 2 (Mar. 2005), available at http://www.10b5.com/2004_study.pdf (reporting that a record 29 foreign issuers were sued in domestic securities class actions in the 2004 fiscal year).

b. In the face of these abuses, Congress acted to broadly reform the process of securities litigation. This movement began with enactment of the PSLRA in 1995. That statute took far-ranging steps to rein in meritless litigation and increase issuers' incentives to disclose information to investors. The PSLRA's reforms included creation of a "safe harbor" for certain "forward-looking statements" by issuers, restrictions on the selection of lead class action plaintiffs in securities-fraud suits, sanctions for frivolous litigation, a stay of discovery pending resolution of motions to dismiss, and heightened pleading standards. See *Dabit*, slip op. 9.

As the Court recognized in *Dabit*, however, plaintiffs responded to enactment of the PSLRA by bringing securities-fraud class actions in state court under state law. See *Dabit*, slip op. 9–10. Prior to the enactment of the PSLRA, state securities laws — the subject of SLUSA — played virtually no role in class-action litigation involving securities traded on national exchanges. But that changed as plaintiffs and their attorneys attempted to circumvent the PSLRA's reforms. The plaintiffs' bar had brought "essentially no significant securities class action litigation" in state courts before the effective date of the PSLRA. H.R. Rep. No. 105–640, at 10 (1998). In the two years after the enactment of the PSLRA, however, at least 104 state-law securities class actions were filed. Rosen, *The Statutory Safe Harbor for Forward-Looking Statements After Two and a Half Years: Has It Changed the Law? Has It Achieved What Congress Intended?*, 76 WASH. U. L.Q. 645, 670 (1998). Predictably, the weaker cases, which would not have survived in federal court after enactment of the PSLRA, were the ones filed in state court. See Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 STAN. L. REV. 273, 307–318 (1998); SEC. Office of General Counsel, *Report to the President and the Congress on the First Year of Practice Under the Private Securities Litigation Reform Act of 1995*, Apr. 1997, at 84 (noting that increase in filings of

state securities class actions "may reflect a migration of weaker cases to state court"). The obvious effect of the movement of securities class actions to state court was to frustrate the PSLRA's purposes and to resurrect the abusive practices that Congress had sought to discourage.

In this context, there is no mystery about Congress's goal in enacting SLUSA: that Act's preemption of state law and attendant removal provision were intended to "stem this 'shif[t] from Federal to State courts' and 'prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of' the Reform Act." *Dabit*, slip op. 10 (citation omitted). Representative Bliley, the House Manager of SLUSA, remarked that "[t]he premise of this legislation is simple: *lawsuits alleging violations that involve securities that are offered nationally belong in Federal court.*" 144 Cong. Rec. H10771 (daily ed. Oct. 13, 1998) (emphasis added); see also H.R. Conf. Rep. No. 105–803, at 13 (1998) ("[The SLUSA] makes Federal court the exclusive venue for most securities class action lawsuits.").

2. *Petitioners' Cramped Reading Of SLUSA's Removal Provision Would Frustrate The Statutory Goals*

Against this background, it is manifest that petitioners' approach — which reads the SLUSA removal provision to require an immediate remand to state court when the district court finds that the plaintiffs' claims are not preempted — would substantially undermine the congressional goals. That approach would make it difficult (and sometimes impossible) to achieve uniformity in the rules governing nationally traded securities. It would encourage forum-shopping by securities fraud class-action plaintiffs, who typically have their choice of venue. It would foster continuation of the abusive practices that Congress sought to prevent. And it would, as a consequence, have the pernicious effects on the securities

markets and the broader national economy that prompted enactment of the PSLRA and the SLUSA. Petitioners' approach accordingly should be rejected.

a. To begin with, if remand orders under SLUSA may not be appealed, there is a substantial prospect that defendants *never* will be able to test on appeal in *any* court their contention that particular state-law securities claims are preempted by federal law. Petitioners assert that a remand under SLUSA necessarily must be premised on the district court's determination that the plaintiff's claim is not preempted. If that is so, state courts likely will conclude on remand that preclusion doctrines such as the law of the case or collateral estoppel bar defendants from relitigating the question whether the state-law claims at issue fall within the preemptive scope of 15 U.S.C. § 77p(b).

Indeed, this Court has suggested that state courts may accord collateral estoppel effect to federal district court determinations made in the course of remands for lack of subject-matter jurisdiction. In *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 586 (1999), the Court hypothesized a federal district court remanding a breach-of-contract action for lack of the requisite amount in controversy to support diversity jurisdiction on the ground that the district court believed state law to bar punitive damages in such cases. The Court remarked that the holding as to the unavailability of punitive damages "will travel back with the case. Assuming a fair airing of the issue in federal court, that court's ruling on permissible state-law damages may bind the parties in state court, although it will set no precedent otherwise governing state-court adjudications." *Ibid.*

Unsurprisingly, many state courts have accepted this Court's suggestion, ruling that law-of-the-case or estoppel doctrines foreclose relitigation of defenses necessarily rejected by the federal district court in the course of determining that removal was improper. For example, in *Adams* v.

Pacific Bell Directory, 111 Cal. App. 4th 93 (2003), the defendant removed the case, persuading the district court that the state-law claims against it were preempted and that the preemption defense involved a federal question that supported federal question jurisdiction. After the court of appeals reversed that ruling and ordered the case remanded for lack of a federal question, the state court held that the defendant was barred under "the principles of the law of the case" from renewing its preemption defense in state court. *Id.* at 97–99.[7]

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[7] See also *Harris* v. *Ladner*, 828 A.2d 203, 205 (D.C. 2003) ("Whether or not the [federal] district court's rulings were 'law of the case,'" not an abuse of discretion to refuse to reconsider them following remand because "upon remand of a removed case, * * * the receiving court treats the pretrial orders of the [district] court as if they were its own."); *In re Wage Payments Litig.*, 759 A.2d 217, 225 (Me. 2000) (holding that state court bound by decision of federal district court prior to remand); *Cordova* v. *Larsen*, 94 P.3d 830, 835 (N.M. Ct. App. 2004) (declining to adopt a "per se rule affording no preclusive effect to a remanding federal court's orders"); *Hinterlong* v. *Baldwin*, 720 N.E.2d 315, 323 (Ill. Ct. App. 1999) ("[D]ecisions of the lower federal courts are not binding on state courts, except insofar as the decision may become the law of the case * * *.") (citations omitted); accord *Underwriters Nat'l Assurance Co.* v. *North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706–707 & n.13 (1982) ("'principles of *res judicata* apply to questions of jurisdiction'"); *Oglala Sioux Tribe of Pine Ridge Indian Reservation* v. *Homestead Mining Co.*, 722 F.2d 1407, 1412 (8th Cir. 1983) (jurisdictional dismissal precludes relitigation of statute's constitutionality); *Segal* v. *AT&T Co.*, 606 F.2d 842, 844–845 (9th Cir. 1979) (jurisdictional dismissal forecloses revisiting issues decided); *Roth* v. *McAllister Bros., Inc.*, 316 F.2d 143, 145 (2d Cir. 1963) (estopping defendant from denying that plaintiff was a seaman, the basis for a prior jurisdictional dismissal); see generally 18A Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 4436, at 340 (3d ed. 1998) ("Although a dismissal for lack of jurisdiction does not bar a

To be sure, some federal courts of appeals addressing preemption under ERISA have indicated that a district court's rejection of the argument that state-law claims are "completely preempted" — and thus its holding that the complete preemption doctrine does not raise a federal question authorizing removal — does not preclude defendants from renewing their preemption defenses in state court. See, *e.g.*, *In re Loudermilch*, 158 F.3d 1143, 1146 (11th Cir. 1998); *Nutter* v. *Monongahela Power Co.*, 4 F.3d 319, 321–322 (4th Cir. 1993); *Baldridge* v. *Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1347–1350 (6th Cir. 1993). Two state court decisions have embraced this view specifically with respect to SLUSA. See *BT Secs. Corp.* v. *W.R. Huff Asset Mgmt. Co.*, 891 So. 2d 310, 316 & n.1 (Ala. 2004) (citing *Loudermilch*, *supra*, for proposition that state court not "bound" by remanding court's resolution of preemption under the SLUSA); *Shaw* v. *Charles Schwab & Co.*, 2003 WL 1463842, at *2 (Cal. Super. Ct. Mar. 7, 2003) (concluding that district court's rejection of preemption under the SLUSA was not "res judicata" on relitigation of defense in state court).

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second action as a matter of claim preclusion, it does preclude relitigation of those issues determined in ruling on the jurisdiction question."); Edney, Comment, *Preclusive Abstention: Issue Preclusion and Jurisdictional Dismissals After* Ruhrgas, 68 U. CHI. L. REV. 193, 197 (2001) ("[A] jurisdictional dismissal can be the basis for issue preclusion in that other court. In general, a jurisdictional dismissal precludes relitigation of the 'precise issue of the jurisdiction' of the dismissing court."). But see, *e.g.*, *McIntosh* v. *Atchison, Topeka & Santa Fe Ry.*, 877 P.2d 11, 16 (Kan. Ct. App. 1994) ("The federal district court's decision that the RLA did not preempt McIntosh's claims was not binding on the state district court [following remand]."); *Provience* v. *Valley Clerks Trust Fund*, 163 Cal. App. 3d 249, 256–257 (1984) (refusing to accord law of the case status to remanding district court's rejection of federal preemption defense).

But other state courts asked to accord preclusive effect to remands under SLUSA likely will decline to follow the ERISA decisions. A state court might well distinguish the ERISA cases by relying on the difference in standards under ERISA for determining whether a state-law action is "completely preempted" (thus authorizing removal under *Metro. Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 63–64 (1987)), and whether a state-law action is merely "substantively preempted" on the merits. Such a court could reason that an ERISA defendant may not remove a state-law claim to federal court because the claim falls outside of the ambit of "complete preemption," but nevertheless enjoys a substantive preemption defense under 29 U.S.C. § 1144. See, *e.g.*, *Dukes* v. *U.S. Healthcare, Inc.*, 57 F.3d 350, 355 (3d Cir. 1995). On petitioners' reading of SLUSA, though, there is no such distinction between the standard governing remand and the one determining the outcome of the merits of the preemption defense.

Moreover, even if a state court does not accord full preclusive effect to the remanding judge's rejection of SLUSA preemption, a second obstacle to revisiting that rejection remains: as a practical matter, state courts are likely to defer to the federal court's judgment that federal law does not preempt a state rule. See, *e.g.*, *Abela* v. *General Motors Corp.*, 677 N.W.2d 325, 327 (Mich. 2004) (lower federal court decisions on federal law persuasive if not binding); *Etcheverry* v. *Tri-Ag Serv., Inc.*, 993 P.2d 366, 368 (Cal. 2000) ("decisions of the lower federal courts * * * on federal questions * * * are persuasive and entitled to great weight"); *Cimarron Foothills Community Ass'n* v. *Kippen*, 79 P3d 1214, 1217 (Ariz. App. Div. 2003) ("We generally defer to federal courts' interpretation of federal law.").

The consequence of petitioners' approach accordingly would be that the district court's decision to remand would effectively resolve the SLUSA preemption claim. This would

make for an asymmetrical rule: although a defendant whose preemption claim was rejected could not obtain appellate review (or an appellate determination in state court) regarding preemption, plaintiffs whose claims were held preempted could test that decision on appeal. It is difficult to believe that Congress, which enacted SLUSA specifically to keep combat abusive securities claims, meant to establish such a regime.

b. That is particularly so because petitioner's approach would have effects that are directly contrary to SLUSA's goals. Most obviously, perhaps, a bar on appellate review would make it virtually impossible to achieve uniformity in the law. That prospect already is apparent: "the district court cases appear to be all over the map on the issue of what state law claims are preempted by SLUSA." *Magyery* v. *Transamerica Fin. Advisors, Inc.*, 315 F. Supp. 2d 954, 959 (N.D. Ind. 2004). Needless to say, that outcome "squarely conflicts with the congressional preference for 'national standards for securities class action lawsuits involving nationally traded securities.'" *Dabit*, slip op. 14 (quoting SLUSA § 2(5), 112 Stat. 3227).

The certainty of disparate results, moreover, necessarily means that district courts will, not infrequently, err when rejecting claims of preemption. Though the error rate of district courts is difficult to estimate, figures for the twelve-month period ending March 31, 2005, indicate that the courts of appeals reversed district court decisions in private civil actions in almost twelve per cent of appeals, with the reversal rate approaching twenty per cent in the Seventh Circuit. Administrative Office of the U.S. Courts, *Federal Judicial Caseload Statistics, March 31, 2005* tab. B–5, at http://www.uscourts.gov/caseload2005/tables/B05mar05.pdf. These figures doubtless significantly understate the likelihood of error where SLUSA claims are involved. The reversal rate for complex cases was higher; for example, courts of appeals

reversed 17.5 per cent of bankruptcy appeals, with that rate exceeding forty per cent in the Third Circuit. *Ibid.* And Judge Newman's study of reversals in the Second Circuit reported that the most frequently reversed category of decisions in the two-year sample, not counting "miscellaneous," were those interpreting federal statutes. Newman, *A Study of Appellate Reversals*, 58 BROOK. L. REV. 629, 633 (1992).

Although these reversal rates provide only a rough proxy for the rate of judicial error, they do suggest that a substantial number of decisions to remand under SLUSA will be wrong. And the risk of error would be compounded yet again if, as petitioners contend, review of decisions to remand is unavailable. As Judge Posner has observed, it is the "reversal threat" that keeps district judges "working carefully." Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1271 (2005); see also Haire, Lindquist & Songer, *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC'Y REV. 143, 147 (2003) (attributing efficacy of circuit court review of district judges' decision-making to esteem in which low reversal rate held, internalized professional norms of *stare decisis*, and desire to avoid the additional work a reversed or vacated decision entails). Or, to quote Judge Coffin: "one reversal is worth a hundred lectures." Coffin, ON APPEAL 163 (1994).

c. This lack of uniformity would be problematic in itself. But it also would undermine SLUSA's most fundamental goals in another way: disparate approaches to the question of preemption would allow class action plaintiffs to strategically file in jurisdictions where district courts are likeliest to reject removal and where, after remand, the state courts are known to apply a rule that precludes relitigation of a SLUSA preemption defense. Because issuers cannot control where their securities are traded, they will not be able to avoid jurisdictions presenting unreasonable litigation risk profiles — an

important component of which is the opportunity to appeal erroneous SLUSA remand orders.

The consequences of erroneously permitting state-law class actions to proceed would be significant. Such suits, of course, would not be governed by the PSLRA's rules and thus would present all of the dangers that prompted the PSLRA's enactment: they could premise liability on forward-looking statements, would not make use of the discovery stay and pleading standards that have curbed abusive discovery, and would not apply the lead plaintiff rules that discourage the "race to the courthouse door." Indeed, some types of state-law actions present especially tempting vehicles for strike suits. The claim in this case, for example — one on behalf of holders of securities rather than purchasers or sellers — is not recognized under federal law precisely because it is of the sort that is likely to "lead to large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and lawyers." *Blue Chip Stamps*, 421 U.S. at 739 (quoting *SEC* v. *Texas Gulf Sulphur*, 401 U.S. 833, 867 (2d Cir. 1968) (Friendly, J., concurring)).

The danger that some abusive suits will improperly escape preemption could have an effect that transcends the impact of individual judgments or settlements. The prospect of even episodic liability inevitably will chill use of the PSLRA safe harbor, deter individuals from serving as independent directors, and discourage accounting firms from providing audit services for newer and smaller companies — that is, the very harms that Congress sought to prevent when it enacted the PSLRA and SLUSA.

d. The risk that petitioners' rule would encourage plaintiffs to file suit in jurisdictions where they hope to achieve a remand if the case is removed to federal court — and the likelihood that success with this tactic would lead plaintiffs to file abusive suits that could not have survived in federal court — is not at all fanciful. Empirical data on class-action

filings confirm that the plaintiffs' bar believes that its chances of prevailing in dubious class actions are best in state courts. A study of class actions filed against Fortune 500 companies from 1988 to 1998, for example, revealed that the number of filings in state court during that period skyrocketed by 1,042 per cent; the relevant number for filings in federal court increased only 338 per cent over the same period.[8]

The perception that some state courts provide a friendly forum for class action litigation is, unfortunately, rooted in reality. Testimony by the U.S. Department of Justice on the need for class-action reform noted that "certain local courthouses have become known for the ease with which they certify class actions," and that the "threat of large awards arising out of class actions filed in these jurisdictions coerces defendants to agree to disproportionately high settlement amounts." *Class Action Lawsuits: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2003) (testimony of Viet Dinh), available at 2003 WL 21130259. And Congress has recently found that a common characteristic of cases exhibiting the worst abuses of the class-action device is "adjudicat[ion] in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over litigation procedures and proposed settlements." S. Rep. No. 109–14, at 5 (2005).

This is not to suggest, of course, that state courts generally will be hostile to preemption rules such as those enacted by SLUSA. Cf. Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1115–1130 (1977). But plaintiffs have proved able to engage in forum shopping by filing nationwide class

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[8] See Federalist Society, *Analysis: Class Action Litigation—A Federalist Society Survey*, 1 Class Action Watch, at http://www.fedsoc.org/Publications/classactionwatch/volume1issue1.htm.

actions in those few jurisdictions with reputations for disregarding class-action certification requirements and the due process rights of both out-of-state defendants and class members. A study conducted in three such venues revealed exponential increases in the numbers of class actions filed in recent years; for example, the Circuit Court of rural Madison County, Illinois — the venue where petitioners brought *this* action — saw an increase in the number of filings of 1,850 per cent from 1998 to 2000. See Beisner & Miller, *They're Making A Federal Case Out Of It...In State Court*, 25 HARV. J. L. & PUB. POL'Y 143, 161 (2001). See also Howard, *Class Actions Set Record Last Year In Madison County; Possible Change In Law Prompted Rush In Filing*, ST. LOUIS POST DISPATCH, Jan. 11, 2004, at E4; Beisner & Miller, *Class Action Magnet Courts: The Allure Intensifies*, 4 BNA CLASS ACTION LITIG. REP. 58 (Jan. 24, 2003).

Congress has expressed alarm at the tendency of these class-action magnet state courts to "issue[] nationwide rulings that actually contradict the laws of other states." S. Rep. No. 109–14, at 24; see also *id.* at 24–26 (providing examples). In fact, some state courts have demonstrated a willingness to certify almost any class action, even classes that other courts applying the same procedural rules have found uncertifiable. See *id.* at 22–23. Occasionally, these certifications have come even before the out-of-state defendant had a chance to respond to the complaint. *Id.* at 21–22.[9]

It was, of course, this very sort of manipulation that prompted enactment of SLUSA — and that made the re-

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[9] These concerns led to enactment of the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, which broadly provides for the removal of national class actions from state to federal court. As petitioners recognize (Pet. Br. 30 & n.38), however, the existence of the comprehensive PSLRA and SLUSA regime led Congress to exempt securities class actions from the CAFA.

moval provision a "key" element of the statute. *Dabit*, slip op. 10 n.7. Petitioners' reading would significantly reduce the efficacy of the removal guarantee and invite continued efforts to circumvent Congress's attempt to work a comprehensive reform of securities class-action litigation. As in *Dabit*, then, "[t]he background, the text, and the purpose" of SLUSA "all support the broader interpretation adopted by the Seventh Circuit." *Id.* at 1.

II. THE BAR ON APPELLATE REVIEW OF REMANDS DOES NOT EXTEND TO CIRCUMSTANCES IN WHICH THE MERITS AND JURISDICTIONAL INQUIRIES ARE IDENTICAL

For the reasons discussed above, petitioners misunderstand SLUSA's removal provision; under that statute, the questions of removability and preemption are discrete ones that are governed by distinct standards — meaning that a district court's decision rejecting a SLUSA preemption defense is reviewable on appeal as a matter of course. But if we are wrong in that submission, the decision below still should be affirmed. If the merits and removability inquiries are identical under SLUSA, petitioners' assertion that 28 U.S.C. § 1447(d) precludes appeal of the district court's decision to remand cannot be squared with principles governing removal that have been articulated by this Court.

It is settled that "Section 1447(d) is not dispositive of the reviewability of remand orders in and of itself." *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 345 (1976). Instead, the limits on appealability stated in that provision "must be construed together" with the standards for removal set out in Section 1447(c) and in light of the purposes animating both provisions. *Ibid.* And there can be no dispute as to the goal of Section 1447(d): it effectuates "the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonging litigation of questions of juris-

diction of the district court to which the case is removed." *United States* v. *Rice*, 327 U.S. 742, 751 (1946). See *Thermtron*, 423 U.S. at 351 (Section 1447(d) intended "to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues"). Thus, "Congress' concern that parties might use the appeal process to protract litigation over jurisdictional issues and thereby further delay litigation over the merits of the case reflects a balancing of competing interests resolved in favor of judicial economy." *Pelleport Investors, Inc.* v. *Budco Quality Theatres, Inc.*, 741 F.2d 273, 277 (9th Cir. 1984).

As suggested by this policy, the Court has recognized that Section 1447(d) bars appeal of a district court's decision to remand on the basis of jurisdictional or procedural flaws that were peripheral to the merits of the litigation — for example, where there was a dispute about the existence of diversity or the amount in controversy. See, *e.g.*, *Volvo of Am. Corp.* v. *Shwarzer*, 429 U.S. 1331 (1976) (case remanded for failure to satisfy amount-in-controversy requirement); *Gravitt* v. *Southwestern Bell Tel. Co.*, 430 U.S. 723 (1977) (case remanded for lack of diversity; see *Gravitt* v. *Southwestern Bell Tel. Co.*, 396 F. Supp. 948 (W.D. Tex. 1975)); *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 125–26 (1995) (remand based on untimely removal). In such cases, the bar on appeal furthers the congressional goal because "[t]he only thing that is at stake is the forum that will hear a claim. This is certainly not an unimportant matter, but it is not so fundamental that a second or third layer of judges must test its correctness." *Adkins* v. *Ill. Cent. R.R. Co.*, 326 F.3d 828, 832 (7th Cir. 2003).

This case, however, involves considerations that are decisively different. Here, the jurisdictional issue (on petitioners' own view of the case) is not distinct from the merits; to the contrary, petitioners submit that determination of jurisdiction requires *resolution* of the merits of one of the principal de-

fenses to liability. Moreover, for the reasons addressed above, that resolution is likely to be final and not subject to renewed litigation upon the case's return to state court. In such circumstances, an appeal of the district court's decision would not "delay litigation over the merits of the case" (*Pelleport Investors*, 741 F.2d at 277); it would *constitute* litigation of the merits.

The Court has never suggested that Section 1447(d) precludes appellate review in such a case, where the decision to remand resolves a significant portion of the merits of the litigation. Indeed, in closely analogous circumstances, the Court has held that appeal is permissible. In *Waco* v. *United States Fid. & Guar. Co.*, 293 U.S. 140 (1934), the district court dismissed the one diverse party from the suit and then, finding that it lacked jurisdiction, remanded the case to state court. See *id.* at 141–142. This Court recognized that "no appeal lies from the order of remand." *Id.* at 143. But the Court nevertheless held that appeal of the dismissal was proper, emphasizing that dismissal of the diverse party, "if not reversed or set aside, is conclusive upon the petitioner." *Id.* at 143–144.

The same outcome is appropriate here.[10] The rationale for precluding appeal of remand orders — avoiding delay in adjudication of the merits — is wholly inapplicable to cases like this one. Indeed, applying the reviewability bar of Section 1447(d) in this case would turn the statutory purpose on its head; it would convert a shield against the use of litigation over peripheral jurisdictional matters for purposes of delay

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[10] In *Waco*, the Court anticipated that the case would be returned to state court following the federal appeal contesting dismissal of the diverse party. See 293 U.S. at 193–194. Such a course could be followed here, although, if the federal court of appeals holds the plaintiffs' claims preempted, the only proper disposition on remand to state court would be dismissal of their claims.

into a sword that prevents defendants from fully contesting liability. As the Ninth Circuit put it in similar circumstances, such an approach "would leave matters of substantive * * * law unreviewable" and "would deprive [the defendant] of its right to appeal a substantive determination of [preemption] law. We cannot believe that Congress intended to immunize such decisions from review." *Pelleport Investors*, 741 F.2d at 277.[11] Section 1447(d) should not be construed "so woodenly" (*Thermtron*, 423 U.S. at 352) as to insulate a ruling on the merits from all review so as to advance a policy of avoiding delay in resolving the merits. See, *e.g.*, *Rowland* v. *California Men's Colony*, 506 U.S. 194, 200 (1993) (noting "the common mandate of statutory construction to avoid absurd results").

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[11] This Court has recognized in related settings that statutory restrictions on appeal must yield when, in particular circumstances, effective review otherwise would be precluded altogether. The collateral order doctrine reflects this norm; federal appellate review is permitted when awaiting final judgment might make important rulings effectively unreviewable. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978); *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); see also *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 11 (1983) ("This order would be entirely unreviewable if not appealed now. Once the state court decided the issue of arbitrability, the federal court would be bound to honor that determination as res judicata."); cf. *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546 (1976) ("capable of repetition, yet evading review" exception to mootness limitation on standing).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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